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In The
Supreme Court Of The United States
October Term, 1998

FLEET BANK, NATIONAL ASSOCIATION,
Petitioner,

v.

THE HONORABLE JOHN P. BURKE, BANKING COMMISSIONER OF THE STATE OF CONNECTICUT AND CONNECTICUT DEPARTMENT OF BANKING, A STATE AGENCY,
Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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TABLE OF CONTENTS

TABLE OF CONTENTS i

TABLE OF AUTHORITIES ii

COUNTERSTATEMENT OF THE CASE 2

REASONS FOR DENYING THE WRIT 4

I. THIS IS NOT AN APPROPRIATE CASE IN WHICH TO REACH THE ISSUES THE PETITIONER PRESENTS. 4

II. THE COURT OF APPEALS CORRECTLY CONCLUDED THAT THE DISTRICT COURT LACKED JURISDICTION OVER THIS ACTION. 7

CONCLUSION 18

APPENDIX TABLE OF CONTENTS .....

TABLE OF AUTHORITIES

Statutes:

28 U.S.C. § 1331 ..... passim
28 U.S.C. § 1367 ..... 3, 5, 6
28 U.S.C. § 1441 12
28 U.S.C. § 2201(a) 12
29 U.S.C. § 185 14
29 U.S.C. §§ 1001, ... 14
42 U.S.C. § 1983 ..... 6, 15
Conn. Gen. Stat. § 36a-156 ..... passim
Conn. Gen. Stat. § 4-176 16

Cases:

Aetna Life Insurance Company v. Haworth, 300 U.S. 227 (1937) 12
American Well Works Co. v. Layne & Bowler Co., 241 U.S. 257 (1916) 9
Arcudi v. Stone & Webster Engineering, Corp., 463 U.S. 1220 (1983) 14
Avco Corp. v. International Ass'n of Machinists, 390 U.S. 557 (1968) 14
Caterpillar Inc. v. Williams, 482 U.S. 386 (1986) 11, 13, 16
City of Chicago v. International College of Surgeons, 522 U.S. 156 (1997) 6

Downriver Community Federal Credit Union v. Penn Square Bank, 879 F.2d 754 (10th Cir. 1989) 14

Exxon Corp v. Department of Revenue of Wisconsin, 447 U.S. 207 (1980) 7

Ex Parte Young, 209 U.S. 123 (1908) 14, 15

First National Bank of Omaha v. Marquette National Bank, 636 F.2d 195 (8th Cir. 1980), cert. denied, 450 U.S. 1042 (1981) 6

Franchise Tax Bd. v. Construction Laborers Vacation Trust, 463 U.S.1 (1983) ..... passim

Franchise Tax Board v. Construction Laborers Vacation Trust, 463 U.S. 1 (1983) 10

Louisville & Nashville R.R. v. Mottley, 211 U.S. 149 (1908) 9, 11

Merrell Dow Pharmaceuticals, Inc. v. Thompson, 478 U.S. 804 (1986) 6, 8, 9, 15

Metropolitan Life Ins. Co. v. Taylor, 481 U.S. 58 (1987) 8, 13, 14

NOPSI v. Council of New Orleans, 491 U.S. 350 (1989) 17

Oklahoma Tax Comm'n v. Graham, 489 U.S. 838 (1989) 9

Oneida Indian Nation v. County of Oneida, 414 U.S. 661 (1974) 14

Pennhurst State School & Hospital v. Halderman, 465 U.S. 89 (1984) 8

Public Service Commission of Utah v. Wycoff Co., 344 U.S. 237 (1952) 10, 12

Shaw v. Delta Air Lines, Inc., 463 U.S. 85 (1983) 14

Skelly Oil Co. v. Phillips Petroleum Co., 339 U.S. 667 (1950) 10, 11, 12, 16

Smith v. Kansas City Title & Trust Co., 255 U.S. 180 (1921) 9

Steffel v. Thompson, 415 U.S. 452 (1974) 11

Stone & Webster Engineering Corp. v. Ilsley, 690 F.2d 323 (2d Cir. 1982), ... 14

Swift & Co. v. Wickham, 382 U.S. 111 (1965) 17

Taylor v. Anderson, 234 U.S. 74 (1914) 8

United Mine Workers of America v. Gibbs, 383 U.S. 715 (1966) 5

Verlinden, B.V. v. Central Bank of Nigeria, 461 U.S. 480 (1983) 10

Rules:

F.R.C.P. 8(a)(1) 5

Other Authorities:

13 C. Wright, A. Miller & M. Kane, Federal Practice & Procedure § 3522 14

Taylor v. Anderson, 234 U.S. 74 (1914) 8

51 U.Chi. L.Rev. 634 (1984) Comment, "Federal Preemption, Removal Jurisdiction and the Well-Pleaded Complaint Rule," 10

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FLEET BANK, NATIONAL ASSOCIATION,
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ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

COUNTERSTATEMENT OF THE CASE

This action represents a national bank's attempt to avoid a state court or administrative determination of whether Connecticut's Banking Commissioner has correctly interepreted Connecticut law to prohibit the assessment of ATM surcharge fees. In this first strike federal action, the bank attempted to manufacture federal jurisdiction by positing both its state defense and a federal preemption defense to anticipated state action, bringing about exactly the result that a number of this Court's federalism doctrines counsel against: a federal court constructing an important state law that no state court had previously construed. This ruling would not bind a state court, nor could it be enforced against a state official such as the Banking Commissioner. In fact, presently ongoing litigation between these same parties in state court will dispositively determine the state law question, underscoring that the Court of Appeals correctly determined that federal question jurisdiction does not lie in this context.

The petitioner's central argument at every stage of this litigation has been that Connecticut law does not prohibit ATM surcharges. In this critical respect the petitioner's Statement of the Case is misleading. Nothing in the record whatsoever supports the petitioner's characterization of its argument that Conn. Gen. Stat. § 36a-156 does not prohibit ATM surcharge fees as a "supplemental claim." (Petition at 4) To the contrary, this quite clearly was the petitioner's *principal* argument, leading the Court of Appeals to describe the action accurately "primarily an attempt to have a federal court construe a state regulatory statute." (*Id.*, A3)

The petitioner filed a one count complaint in District Court alleging "a justiciable controversy . . . over whether the defendants have correctly interpreted the Connecticut

ATM statutes and, if so, whether these statutes are pre-empted by federal banking law." (Petitioner's App. A81) The petitioner's first Prayer For Relief requests a declaration that "the Connecticut ATM statutes do not prohibit Fleet from exercising the power to charge fees to non-depositor customers using its ATMs." (*Id*). The petitioner pleaded jurisdiction *solely* under 28 U.S.C. § 1331, and never once alleged, or even suggested, that it was pursuing a separate, supplemental "claim" under 28 U.S.C. § 1367. (*See id.* A78)

Finally, after fending off the respondents' argument that the Court should abstain under the *Pullman* doctrine in favor of a state court determination of this state law issue, (*Id.* A51-A57) the petitioner sought a plaintiff's summary judgment *exclusively* on the state law issue: "Connecticut law does not prohibit Fleet from exercising the power to charge fees to non-depositior customers for the use of its ATMs." (*Id.* A89)

Also, although the petitioner correctly states that the action it filed immediately after the Court of Appeals' decision in this case "omits any claim under state law" (Petition at 5), to be complete it should be noted that that suit does not admit the meaning and application of state law, as the Court of Appeals' had indicated was necessary to confer jurisdiction upon a federal court. (Petitioner's App. A23) The parties are still at issue over the construction of the state law that the petitioner claims: 1) does not prohibit ATM surcharge fees, and 2) is preempted by federal law. This dispute has most recently manifested itself in the Commissioner's state law action against the petitioner and two other national banks, seeking to prevent the imposition of ATM fees. (App. A2) Thus far, the petitioner has not agreed that Conn. Gen. Stat. § 36a-156 in fact prohibits such fees.

REASONS FOR DENYING THE WRIT

The petitioner has failed to identify any legal issue that cries out for this Court to determine. This is especially true in light of the ongoing litigation between the parties, which is presently continuing in no fewer than four forums. Rather, the petitioner asks this Court to satisfy its academic curiosity on a matter that does not truly arise in this case and does not otherwise warrant this Court's attention.

I. THIS IS NOT AN APPROPRIATE CASE IN WHICH TO REACH THE ISSUES THE PETITIONER PRESENTS.

Apart from the fact that the petitioner's argument in support of certiorari itself lacks merit, which is addressed in Part II, *infra*, at least two reasons make it imprudent for this Court to accept this case to address the question presented.

First, as the petitioner candidly admits, the parties' dispute over ATM surcharge fees is ongoing in both the state and federal courts. On the same day that the Court of Appeals entered judgment in this case, the petitioner (along with one other national bank) sued the Commissioner (a respondent to this petition) once again in District Court praying for a very similar injunction. (*Compare* Petitioner's App. A82 with A110) The national banks thereafter enlisted the support of the Office of the Comptroller of the Currency ("OCC"), which intervened as a plaintiff in the action and also moved for injunctive relief.

On April 7, 1999, the District Court granted the OCC's motion for a preliminary injunction, although on grounds narrower than either the OCC or the banks had hoped. (*See* id. A163-A164) To this point, the Commissioner alone has appealed to the Court of Appeals for the

Second Circuit, although the appeal period has not elapsed as of this date.

Since the District Court's ruling specifically held that the Banking Commissioner could enforce Connecticut's ban on ATM surcharges in state court, the Commissioner also brought a state court action against the national banks seeking a definitive determination of the meaning of the state law. (App. A2) Although that suit is in its infancy, there are now at least three forums in which the parties may have their respective rights determined and settled (the Second Circuit, District Court and State Court). Thus, accepting the instant case for review might very likely turn out to be an imprudent use of the Court's and the parties' time and resources on an issue that, by the petitioner's own representation, arises often. (Petition at 12 to 17) Indeed, by accepting this case for review, this Court may well interfere with an orderly resolution of the issues that are now squarely before the Connecticut court.

Second, the respondents are obliged to point out that this case is not the case the petitioner describes it to be. *See* Sup. Ct. Rule 15.2. As discussed above, the petitioner has never invoked, either at the District Court or Circuit Court level, the federal court's "supplemental jurisdction" in support of what it now claims to be a state law "claim" -- the meaning of Conn. Gen. Stat. § 36a-156(a). This supposed state "claim" was not a separate count in the petitioner's complaint. The petitioner did not, as it was obliged to do under F.R.C.P. 8(a)(1), specifically allege 28 U.S.C. § 1367 as a jurisdictional basis in its complaint. (*See* Petitioner's App. A78) Nor did the petitioner ever previously defend the District Court's jurisdiction to opine exclusively on the meaning of a state statute by citing either to § 1367, to United Mine Workers of America v. Gibbs, 383 U.S. 715 (1966), or to any of the discretionary factors that

supplemental jurisdiction permits the District Court to evaluate.[1/] Merrell Dow Pharmaceuticals, Inc. v. Thompson, 478 U.S. 804, 809 n.6 (1986) ("Jurisdiction may not be sustained on a theory that the plaintiff has not advanced.").

Thus, even if the issue the petitioner presents were worthy of this Court's consideration, it does not truly arise in this case.[2/] The petitioner's claim that the judgment below conflicts with 28 U.S.C. § 1367 or with any of this Court's decisions under it is entirely manufactured.[3/]

1/ Of course, the reason the petitioner has never before articulated the claim as one of "supplemental jurisdiction" is very simply because its complaint does not raise a supplemental state law "claim," any more than it raises a federal claim. Rather, as the Court of Appeals correctly recognized, the petitioner's federal declaratory action raises what would be its two defenses to a state proceeding brought against it: first, "its state law defense that section 36a-156 does not prohibit the surcharge fee but also, if the state law defense failed, its federal law defense of preemption." (Petitioner's App., A7) Thus, the state law claim "is not entirely distinct from the federal preemption claim. Instead, in reality it presents an independent issue preliminary to the federal claim." (*Id.* A20)

2/ The petitioner further seeks to raise belatedly an argument that its action is truly an action under 42 U.S.C. § 1983. (Petition at 25 n.19) As the petitioner admits, however, its complaint contains no such allegation and it never pursued its claim as such -- and with good reason because it is improbable that its complaint could state a cause of action for a violation of § 1983. Compare First National Bank of Omaha v. Marquette National Bank, 636 F.2d 195, 198 (8th Cir. 1980), cert. denied, 450 U.S. 1042 (1981) (claimed violation of National Bank Act does not give rise to § 1983 action). At any rate, it is the better practice for this Court to decline to review cases recastas a litigant now wishes that it had presented the matter in the courts below.

3/ In City of Chicago v. International College of Surgeons, 522 U.S. 156 (1997), unlike this case, there *was* an independent basis for federal question jurisdiction, which then permitted the federal court to adjudicate a properly submitted supplemental claim. That

II. THE COURT OF APPEALS CORRECTLY CONCLUDED THAT THE DISTRICT COURT LACKED JURISDICTION OVER THIS ACTION.

The Court of Appeals was undoubtedly right in determining that no federal court subject matter jurisdiction existed in this case. The petitioner's claim against the respondent does nothing more than raise its defenses to an anticipated state enforcement action, and therefore does not "arise under" federal law as this Court has consistently construed and applied that phrase. 28 U.S.C. § 1331.[4/] The Court of Appeals' decision is consistent with this Court's well-established jurisdictional precedents, which are designed in part to avoid placing federal courts in the ackward position of deciding important issues of state law.

That the Court of Appeals was correct that the District Court lacked jurisdiction is best illustrated by looking to the judgment that the petitioner sought to defend on appeal and would urge this Court to reinstate. That judgment represents a federal court adjudication of a purely state law issue: whether Connecticut law prohibits banks from charging ATM fees. A federal court is not the final arbitrer of state law, and therefore this federal ruling on state law would not bind a state court. *See* Exxon Corp v. Department of Revenue of Wisconsin, 447 U.S. 207, 226 n.9 (1980). In fact, the only Connecticut court to pass on the issue has held the other way. Fleet Bank, N.A. v. Burke, 45 Conn. Sup. 566, ___ A.2d ___ (1998). Further, the Eleventh Amendment prevents a federal court from granting injunctive relief against a state official on the basis of state

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case does not conflict with this case.

4/ Congress has granted the federal district courts jurisdiction over "all civil actions arising under the Constitution, laws, or treaties of the United States." 28 U.S.C. § 1331 (emphasis supplied).

law. Pennhurst State School & Hospital v. Halderman, 465 U.S. 89, 121 (1984). Thus, the District Court's declaratory judgment in this case would be unenforceable against the defendant Commissioner of Banking. *See* id. at 106 ("[I]t is difficult to think of a greater intrusion of state sovereignty than when a federal court instructs state officials on how to conform their conduct to state law.").

That the Court of Appeals was clearly correct is explained doctrinally by this Court's explications of the "well pleaded complaint rule." Principles of federalism and comity similar to those described in the above paragraph manifest themselves in this doctrine, by which this Court measures whether a case "arises under" federal law for purposes of 28 U.S.C. § 1331. The "well-pleaded complaint rule" represents "the basic principle marking the boundaries of the federal question jurisdiction of the federal district courts." Metropolitan Life Ins. Co. v. Taylor, 481 U.S. 58, 63 (1987).

"It is long settled law that a cause of action *arises under* federal law only when the plaintiff's well-pleaded complaint raises issues of federal law." Id. (emphasis supplied). The "mere presence of a federal issue in a state cause of action does not automatically confer federal-question jurisdiction." Merrell Dow Pharmaceuticals Inc. v. Thompson, 478 U.S. 804, 813 (1986). Rather, the well-pleaded complaint rule confines the search for a basis of federal question jurisdiction to "what *necessarily* appears in the plaintiff's statement of his own claim in the bill or declaration, unaided by anything alleged in anticipation or avoidance of defenses which it is thought the defendant may interpose." Taylor v. Anderson, 234 U.S. 74, 75-76 (1914)

(emphasis supplied); *see also* Oklahoma Tax Comm'n v. Graham, 489 U.S. 838, 840-41 (1989).[5/]

Specifically, the "well-pleaded complaint rule" precludes federal jurisdiction if a federal question is merely asserted or anticipated as a defense to a state law claim. Louisville & Nashville Railroad Co. v. Mottley, 211 U.S. 149, 152 (1908). "A defense that raises a federal question is inadequate to confer federal jurisdiction." Merrell Dow Pharmaceuticals Inc. v. Thompson, 478 U.S. 804, 808 (1986).

Several policies underlie and support the well-pleaded complaint rule. This Court has "consistently emphasized that, in exploring the outer reaches of § 1331, determinations about federal jurisdiction require sensitive judgments about congressional intent, judicial power, and the federal system." Id. at 810. The Court's articulated "need for prudence and restraint in the jurisdictional inquiry"; id;[6/] includes considerations of comity counseling against "seizing litigations from state courts merely because one, normally a defendant, goes to federal court to begin his

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[5/] This Court has noted that the vast majority of cases brought under the general federal question jurisdiction of the federal courts include "those in which federal law creates the cause of action" or "where the vindication of a right under state law *necessarily* turned on some construction of federal law." Merrell Dow Pharmaceuticals Inc. v. Thompson, 478 U.S. 804, 808 (1986). (emphasis supplied) *See* American Well Works Co. v. Layne & Bowler Co., 241 U.S. 257, 260 (1916); Smith v. Kansas City Title & Trust Co., 255 U.S. 180 (1921). The petitioner does not argue that this case falls within either category.

[6/] Inexplicably, the petitioner devotes a separate section of its Petition to criticizing the Court of Appeals' discussion of such "prudential" concerns. (Petition at 22-24) These concerns, however, so clearly underpin the well-pleaded complaint rule and help define its contours that not to articulate and consider them might likely have lead the Court below to err.

federal defense before the state court begins the case under state law." Franchise Tax Board v. Construction Laborers Vacation Trust, 463 U.S. 1, 16 n.14 & 21 n.22 (1983); Public Service Commission of Utah v. Wycoff Co., 344 U.S. 237, 248 (1952). Similarly informing the federal judiciary's prudence is the desire of federal courts to avoid having to decide doubtful questions of state law in order to avoid federal constitutional questions. Skelly Oil Co. v. Phillips Petroleum Co., 339 U.S. 667, 673 (1950). These policies would be totally undermined if, in a case like the present one, a potential federal defense, or response to a federal defense, could confer jurisdiction on a federal court, especially where, as here, that federal defense would never arise should the state claims not succeed. Comment, "Federal Preemption, Removal Jurisdiction, and the Well-Pleaded Complaint Rule," 51 U.Chi. L.Rev. 634, 636-39 (1984).

Finally, this Court has eschewed an interpretation of § 1331 that would increase the volume of federal court litigation. Skelly Oil Co. v. Phillips Petroleum Co., 339 U.S. 667, 673 (1950). This policy is consistent with this Court's articulated understanding of its "limited jurisdiction" under § 1331. Merrell Dow Pharmaceuticals Inc. v. Thompson, 478 U.S. 804, 808 (1986) (federal question jurisdiction long construed as a more limited grant of power than Art. III); Franchise Tax Bd. v. Construction Laborers Vacation Trust, 463 U.S.1, 9-10 (1983) (well-pleaded complaint rule "limits the number of cases . . . that may be initiated in or removed to federal district court, thereby avoiding . . . a number of potentially serious federal-state conflicts."); Verlinden, B.V. v. Central Bank of Nigeria, 461 U.S. 480, 494 (1983) (§ 1331, although broadly phrased, has been continuously construed and limited).

These policies and their application to this case and others do not, as the petitioner suggests, deny a litgant a proper forum for adjudicating its federal claim, nor ultimately deny it a federal forum. "[S]tate courts have the solemn responsibility, equally with the federal courts, to guard, enforce, and protect every right granted or secured by the Constitution of the United States . . . ." Steffel v. Thompson, 415 U.S. 452, 460-61 (1974). Thus, state courts are perfectly capable of adjudicating any federal claim the petitioner might have, and more capable than the federal courts of adjudicating the state claims or defenses of either party.

Further, "the absence of original jurisdiction does not mean that there is no federal forum in which a preemption defense may be heard. If the state courts reject a claim of federal preemption, that decision may ultimately be reviewed on appeal by this Court." Franchise Tax Board v. Construction Laborers Vacation Trust, 463 U.S. 1, 12 (1983). See also Caterpillar Inc. v. Williams, 482 U.S. 386, 393 (1986) (preemption arguments were not properly the basis for a removal petition and must be addressed in the first instance by the state court). That the petitioner would prefer an *original* federal forum, which, contrary to its understanding, it has no "right" to, does not mean that Congress has provided one.

The Court has applied the rule symmetrically in various procedural contexts. Under, the well-pleaded complaint rule, a case does not "arise under" federal law when a litigant with a state law claim sues under state law and raises the defendant's federal defense in its own complaint; Louisville & Nashville R.R. v. Mottley, 211 U.S. 149, 150-51 (1908); when that same litigant seeks a federal declaratory judgment that the defendant's federal defense is insufficient; Skelly Oil Co. v. Phillips Petroleum Co., 339 U.S.

667, 670 (1950); when the target of the state law claim seeks to remove a state lawsuit to federal court pursuant to 28 U.S.C. § 1441[7/] based upon its federal defense; Franchise Tax Board v. Construction Laborers Vacation Trust, 463 U.S. 1, 12 (1983) (fidelity to Skelly's spirit leads to extension to state declaratory judgment action defendant seeks to remove); or when the target of the state law claim acts preemptively to establish the validity of its federal defense by a federal declaratory judgment action. Public Service Commission of Utah v. Wycoff Co., 344 U.S. 237, 248 (1952). The instant case falls under the *Wycoff* rubric: a preemptive federal action to declare invalid, and enjoin if necessary, a state statute on federal grounds.[8/] The Court of

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7/ 28 U.S.C. § 1441(a): "Except as otherwise expressly provided by Act of Congress, any civil action brought in a State court of which the district courts of the United States have original jurisdiction, may be removed by the defendant or the defendants, to the district court of the United States for the district and division embracing the place where such action is pending."

8/ "[A]s in many actions for declaratory judgment, the realistic position of the parties is reversed. The plaintiff is seeking to establish a defense against a cause of action which the declaratory defendant may assert." Public Service Commission of Utah v. Wycoff Co., 344 U.S. 237, 248 (1952). The operation of the Federal Declaratory Judgment Act, 28 U.S.C. § 2201(a), "is procedural only." Aetna Life Insurance Company v. Haworth, 300 U.S. 227, 240 (1937). By the Act, "Congress enlarged the range of remedies available in the federal courts but did not extend their jurisdiction." Skelly Oil Co. v. Phillips Petroleum Co., 339 U.S. 667, 671 (1950). To permit a declaratory plaintiff to invoke federal jurisdiction to assert a federal defense, would improperly augment the otherwise limited federal jurisdiction. Id. at 673-74. Thus, if federal jurisdiction would be lacking but for the availability of the federal declaratory judgment procedure, and a federal claim only arises as a defense to a state action, federal jurisdiction is barred. Id. at 672.

As this Court has stated:

Where the complaint in an action for declaratory

Appeals' essential holding in this case is thus consistent with well-established precedent of this Court.

These permutations of the well-pleaded complaint rule apply equally to the defense of federal preemption. "Federal pre-emption is ordinarily a federal defense to the plaintiff's suit. As a defense, it does not appear on the face of a well-pleaded complaint . . . ." Metropolitan Life Ins. Co. v. Taylor, 481 U.S. 58, 63-64 (1987); *see also* Caterpillar Inc. v. Williams, 482 U.S. 386, 393 (1986) ("[I]t is now settled law that a case may not be removed to federal court on the basis of a federal defense, including the defense of pre-emption, even if the defense is anticipated in the plaintiff's complaint, and even if both parties concede that the federal defense is the only question truly at issue."); Franchise Tax Board v. Construction Laborers Vacation Trust, 463 U.S. 1, 14 (1983) (same). Thus, even if the parties were to ignore the state law question the petitioner's complaint posits, they could not confer jurisdiction upon the federal courts.

This Court has recognized a narrow exception to the well-pleaded complaint doctrine, however, for those cases

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> judgment seeks in essence to assert a defense to an impending or threatened state court action, it is the character of the threatened action, and not of the defense, which will determine whether there is federal-jurisdiction in the district court. If the cause of action, which the declaratory defendant threatens to assert, does not itself involve a claim under federal law, it is doubtful if a federal court may entertain an action for declaratory judgment establishing a defense to that claim. This is dubious even though the declaratory complaint sets forth a claim of federal right, if that right is in reality in the nature of a defense to a threatened cause of action.

Public Service Commission of Utah v. Wycoff Co., 344 U.S. 237, 248 (1952).

in which Congress has "so completely pre-empt[ed] a particular area that any civil complaint raising this select group of claims is necessarily federal in character." Metropolitan Life Ins. Co. v. Taylor, 481 U.S. 58, 63-64 (1987). In such areas, the Court has held that the preemptive force of federal law is "so powerful as to displace entirely any state cause of action." Id. at 64. The petitioner has not sought to fit itself within this exception.[9/]

Rather, the petitioner hangs its federal jurisdictional hat upon a footnote in this Court's decision in Shaw v. Delta Air Lines, Inc., 463 U.S. 85, 96 n.14 (1983). In *Shaw* the plaintiffs sought a federal declaratory judgment that the New York Human Rights Law was preempted by ERISA. The Court saw no jurisdictional problem because:

> It is beyond dispute that federal courts have jurisdiction over suits to enjoin state officials from interfering with federal rights. See Ex Parte Young, 209 U.S. 123 (1908). A

9/ To date, the Court has recognized only three areas that are "completely preempted." *See* 13 C. Wright, A. Miller & M. Kane, Federal Practice & Procedure § 3522 (2d ed. 1998 Supp.). First is the "unique preemptive force of ERISA," 29 U.S.C. §§ 1001, et seq. Id. at pp. 65-66; *see* Stone & Webster Engineering Corp. v. Ilsley, 690 F.2d 323, 328 (2d Cir. 1982), *aff'd sub. nom.* Arcudi v. Stone & Webster Engineering, Corp., 463 U.S. 1220 (1983). Second is the Labor Management Relations Act, 29 U.S.C. § 185, et seq. *See* Franchise Tax Board v. Construction Laborers Vacation Trust, 463 U.S. 1, 23-24 (1983); Avco Corp. v. International Ass'n of Machinists, 390 U.S. 557 (1968). Finally, there are certain tribal claims that are "necessarily federal in character." *See* Oneida Indian Nation v. County of Oneida, 414 U.S. 661 (1974). Obviously, none of these three areas of the law is involved in the petitioner's suit; and in our dual system of banking, federal banking law plainly does not "completely" displace state banking law. *Compare* Downriver Community Federal Credit Union v. Penn Square Bank, 879 F.2d 754, 758-59 (10th Cir. 1989).

> plaintiff who seeks injunctive relief from state regulation, on the ground that such regulation is pre-empted by a federal statute which, by virtue of the Supremacy Clause of the Constitution, must prevail, thus presents a federal question which the federal courts have jurisdiction under 28 U.S.C. § 1331 to resolve. . . . This Court, of course, frequently has resolved pre-emption disputes in a similar jurisdictional posture.

Id. (case cites omitted)

Citing *Ex Parte Young*, the first sentence of this footnote stands for the unremarkable proposition that the Eleventh Amendment does not deprive the federal courts of jurisdiction over a "suit against State officials . . . . if the suit seeks to force them to conform their conduct to federal law." 1 J. Nowak & R. Rotunda, Treatise on Constitutional Law (2d ed. 1992) § 2.12, p. 151; *see* Ex Parte Young, 209 U.S. 123, 160-62 (1908). This well-recognized exception to a State's Eleventh Amendment immunity from federal suit does not itself create federal jurisdiction, however, and the federal plaintiff must therefore otherwise be properly in federal court.[10/] The second and third sentences, in context

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[10/] A claimed violation of 42 U.S.C. § 1983 would be an example of a proper jurisdictional basis since in such an instance "federal law creates the cause of action." Merrell Dow Pharmaceuticals, Inc. v. Thompson, 478 U.S. 804, 808 (1986). *See* Steffel v. Thompson, 415 U.S. 452 (1974). In *Ex Parte Young*, decided before this Court's "arising under" jurisprudence had developed, the federal plaintiffs alleged constitutional violations that would fall within § 1983 (due process and equal protection). Similarly, a number of the circuit court cases cited in support of a purported circuit split (Petition at 12-15) had a jurisdictional basis under § 1983. As noted above, the petitioner did not plead this as a § 1983 action, and it has no cognizable right under that statute.

Additionally, the Court should not be misled into believing that

and in light of this Court later precedents, simply means only that where a claim of "complete preemption" is made out, a federal plaintiff may be said to assert a claim "arising under" federal law. *See* Metropolitan Life Ins. Co. v. Taylor, 481 U.S. 58, 63-64 (1987); Caterpillar Inc. v. Williams, 482 U.S. 386, 393 (1986).

To read the *Shaw* footnote otherwise would upset the intended symmetry of the well-pleaded complaint rule. Whether a state suit may be removed to federal court is tested by whether the state plaintiff could have begun the action originally in federal court. Franchise Tax Board v. Construction Laborers Vacation Trust, 463 U.S. 1, 19 (1983). The respondents clearly could not have brought a action in federal court seeking a declaration that federal law does not preempt the state law. Skelly Oil Co. v. Phillips Petroleum Co., 339 U.S. 667, 670 (1950). Thus, the petitioner cannot manufacture federal question jurisdiction merely by switching the parties around. Public Service Commission of Utah v. Wycoff Co., 344 U.S. 237, 248 (1952).

Also, to adopt the petitioner's position would be to elevate preemption to the highest plane among federal defenses, including constitutional defenses. Although no other federal defense would suffice to support a removal petition

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the petitioner faced the "Hobson's choice," as the plaintiff did in Ex Parte Young., of violating the law as a test case or continuously violating the law and exposing itself to penalties. (*See* Petition at 24) As the record clearly reflects, the petitioner in September, 1995, asked the Commissioner for his opinion on whether Conn. Gen. Stat. § 36a-156 prohibited ATM charges. (Petitioner's App. A97) Under state law, the petitioner could have asked the Commissioner to reduce this opinion to a declaratory ruling, which the petitioner could then have appealed to state court. Conn. Gen. Stat. § 4-176. (App. A6) Eschewing any of the available state processes, the petitioner instead waited until January, 1997, to bring this federal action.

or a declaratory judgment, the petitioner's view is that any claim of federal preemption does suffice to bring it within 28 U.S.C. § 1331. This is inconsistent with this Court's numerous holdings in other contexts that, to the contrary, at best a claim of federal preemption is on the same plane as any other constitutional defense. Swift & Co. v. Wickham, 382 U.S. 111, 120 (1965) (preemption claim did not require convening of three-judge district court); NOPSI v. Council of New Orleans, 491 U.S. 350, 365 (1989) (For *Younger* abstention purposes, "[t]here is no greater federal interest in enforcing the supremacy of federal statutes than in enforcing the supremacy of explicit constitutional guarantees").

Thus, the Court of Appeals properly described the petitioner's theory as "an ill-advised use of federal question jurisdiction," inappropriately opening the federal courts to preemption claims that should be first litigated in state court because "[i]n almost every area in which state law regulates private conduct, some federal statute can arguably be invoked . . . to provide the basis for a preemption claim." (Petitioner's App. A20-A21).

CONCLUSION

For all of these reasons, the Court should deny the petition for a writ of certiorari.

Respectfully submitted,

RESPONDENTS
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No. 98-1661

In The

Supreme Court Of The United States

October Term, 1998

FLEET BANK, NATIONAL ASSOCIATION,

Petitioner,

v.

THE HONORABLE JOHN P. BURKE, BANKING COMMISSIONER OF THE STATE OF CONNECTICUT AND CONNECTICUT DEPARTMENT OF BANKING, A STATE AGENCY,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

APPENDIX

APPENDIX TABLE OF CONTENTS

John P. Burke, Banking Commissioner of the State of Connecticut, et al. v. Fleet National Bank; et al, Verified Complaint A2

Conn. Gen. Stat. § 4-176 ..... A6

RET. MAY 4, 1999	:	**CV990588717-S**
JOHN P. BURKE, BANKING	:	**SUPERIOR COURT**
COMMISSIONER OF THE STATE	:	**JUDICIAL DISTRICT**
OF CONNECTICUT, and THE	:	**OF HARTFORD**
STATE OF CONNECTICUT	:	
V.	:	
FLEET NATIONAL BANK	:	
FIRST UNION NATIONAL BANK	:	
and BANKBOSTON, N.A.	:	**APRIL 16, 1999**

VERIFIED COMPLAINT

1. This suit is brought by John P. Burke, Banking Commissioner of the State of Connecticut, under the authority of Conn. Gen. Stat. § 36a-50(b) to enforce the provisions of Conn. Gen. Stat. § 36a-156 governing the operation of automated teller machines ("ATMs") in the State of Connecticut.

2. The defendant, Fleet Bank, National Association ("Fleet"), is a national bank doing business in the state of Connecticut.

3. The defendant, First Union National Bank ("First Union"), is a national bank doing business in the state of Connecticut.

4. The defendant, BankBoston, N.A. ("BankBoston"), is a national bank doing business in the state of Connecticut.

5. Fleet owns and operates ATMs in the state of Connecticut.

6. First Union owns and operates ATMs in the state of Connecticut.

7. BankBoston owns and operates ATMs in the state of Connecticut.

8. Fleet has imposed, and on information and belief intends to impose, fees or surcharges and collect them from non-depositors who use its ATMs in the state of Connecticut.

9. First Union has imposed, and on information and belief intends to impose, fees or surcharges and collect them from non-depositors who use its ATMs in the state of Connecticut.

10. BankBoston has imposed, and on information and belief intends to impose, fees or surcharges and collect them from non-depositors who use its ATMs in the state of Connecticut.

11. Conn. Gen. Stat. § 36a-156 does not authorize and thus prohibits the imposition of fees or surcharges on non-depositors who use an ATM machine in the state of Connecticut.

12. The plaintiff, State of Connecticut and the people of the State, have suffered and will continue to suffer immediate and irreparable harm if such fees or surcharges are imposed and collected.

HEREOF FAIL NOT, BUT OF THIS WRIT, with your doings therein, make due service and return according to law.

Dated at Hartford, Connecticut, this 16th day of April, 1999.

PLAINTIFFS
/s/ Richard Blumenthal
RICHARD BLUMENTHAL
ATTORNEY GENERAL
Juris No. 403804

BY:
/s/ William J. Prensky
William J. Prensky
Assistant Attorney General
Juris No. 85294
55 Elm Street
P.O. Box 120
Hartford, CT 06141-0120
Tel. (860) 808-5270

Please enter our appearance for
the plaintiffs in this action.

Richard Blumenthal
Attorney General

/s/ William J. Prensky
William J. Prensky
Assistant Attorney General

VERIFICATION

STATE OF CONNECTICUT)
) ss. Hartford, Date: April 16, 1999
COUNTY OF HARTFORD)

I, John P. Burke, being duly sworn, depose and say:

1. I am the Banking Commissioner of the State of Connecticut. I am authorized, pursuant to Conn. Gen. Stat. §§ 36a-1 et seq. to administer the provisions of the Banking Law of Connecticut.

2. I have read the Verified Complaint and the contents thereof are true to the best of my knowledge, information, and belief.

3. The sources of my information as to the matters stated in the Verified Complaint emanate from conversations between counsel for the Department of Banking and counsel representing the defendant banks, and records, affidavits, and other documents in the possession of the Department of Banking.

/s/ John P. Burke
John P. Burke

Subscribed and sworn to before me this 16th day of April, 1999.

/s/ Paul A. Bobruff
Commissioner of the Superior Court

Conn. Gen. Stat. § 4-176. Declaratory rulings. Petitions. Regulations

(a) Any person may petition an agency, or an agency may on its own motion initiate a proceeding, for a declaratory ruling as to the validity of any regulation, or the applicability to specified circumstances of a provision of the general statutes, a regulation, or a final decision on a matter within the jurisdiction of the agency.

(b) Each agency shall adopt regulations, in accordance with the provisions of this chapter, that provide for (1) the form and content of petitions for declaratory rulings, (2) the filing procedure for such petitions and (3) the procedural rights of persons with respect to the petitions.

(c) Within thirty days after receipt of a petition for a declaratory ruling, an agency shall give notice of the petition to all persons to whom notice is required by any provision of law and to all persons who have requested notice of declaratory ruling petitions on the subject matter of the petition.

(d) If the agency finds that a timely petition to become a party or to intervene has been filed according to the regulations adopted under subsection (b) of this section, the agency: (1) May grant a person status as a party if the agency finds that the petition states facts demonstrating that the petitioner's legal rights, duties or privileges shall be specifically affected by the agency proceeding; and (2) may grant a person status as an intervenor if the agency finds that the petition states facts demonstrating that the petitioner's participation is in the interests of justice and will not impair the orderly conduct of the proceedings. The agency may define an intervenor's participation in the manner set forth in subsection (d) of section 4-177a.

(e) Within sixty days after receipt of a petition for a declaratory ruling, an agency in writing shall: (1) Issue a ruling declaring the validity of a regulation or the applicability of the provision of the general statutes, the regulation, or the final decision in question to the specified circumstances, (2) order the matter set for specified proceedings, (3) agree to issue a declaratory ruling by a specified date, (4) decide not to issue a declaratory ruling and initiate regulation-making proceedings, under section 4-168 on the subject, or (5) decide not to issue a declaratory ruling, stating the reasons for its action.

(f) A copy of all rulings issued and any actions taken under subsection (e) of this section shall be promptly delivered to the petitioner and other parties personally or by United States mail, certified or registered, postage prepaid, return receipt requested.

(g) If the agency conducts a hearing in a proceeding for a declaratory ruling, the provisions of subsection (b) of section 4-177c, section 4-178 and section 4-179 shall apply to the hearing.

(h) A declaratory ruling shall be effective when personally delivered or mailed or on such later date specified by the agency in the ruling, shall have the same status and binding effect as an order issued in a contested case and shall be a final decision for purposes of appeal in accordance with the provisions of section 4-183. A declaratory ruling shall contain the names of all parties to the proceeding, the particular facts on which it is based and the reasons for its conclusion.

(i) If an agency does not issue a declaratory ruling within one hundred eighty days after the filing of a petition therefor, or within such longer period as may be agreed by

the parties, the agency shall be deemed to have decided not to issue such ruling.

(j) The agency shall keep a record of the proceeding as provided in section 4-177.